Petition

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No. 81-

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOUVERT WELDON,

Petitioner,

vs.

DELBERT HUNT and the
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the district court and court of appeals err in holding that the petitioner did not state a cause of action under the Tort Claims Act and the Fifth Amendment when the Equal Employment Opportunity Commission accepted the administrative jurisdiction over the petitioner's complaint of wrongful termination by her employer, a public entity, when as a matter of law such administrative jurisdiction was nonexistent?

II.

Did the district court and court of appeals err in holding that the Equal Employment Opportunity Commission did not owe a duty to the petitioner to inform her that she could not sue her employer under 42 U.S.C. 2000e (title VII) as a matter of law, when failure to timely pursue other remedies while the EEOC retained administrative jurisdiction would preclude her from suing her employer for wrongful discharge because all available statutes of limitations would expire?

III.

Did the district court and court of appeals err in holding that petitioner had no cause of action against the EEOC where the government acted beyond its statutory authority in accepting jurisdiction over a charge of wrongful termination against a public entity?

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OPINIONS BELOW

The Order of the District Court, Eastern District of Michigan, Southern Division, is appended to the petition in the Appendix (App. p. 1a). The Opinion of the Court of Appeals for the Sixth Circuit is also appended to the petition (App. pp. 2a-4a). Neither opinions of the lower courts are published. The Order of the district court dismissed this lawsuit for failing to state a cause of action. The United States Court of Appeals for the Sixth Circuit affirmed the district court.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on June 22, 1981, and a copy thereof is appended to the petition in the Appendix (App. 2a-4a). The jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

U.S. Const, Amend V
28 USCS § 1254(1)
28 USCS § 1331(a)
28 USCS § 1346(b)
28 USCS § 1391(c)
28 USCS § 2674
28 USCS § 2675
28 USCS § 2680
42 USCS § 1981
42 USCS § 1983
42 USCS § 2000e-1
42 USCS § 2000e-4(a), (b) and (g)
42 USCS § 2000e-5(a), (b) and (e)
29 CFR §1601.6
MSA § 17.458(1)
MSA Title 27A, § .5805

STATEMENT

In June, 1972, Plaintiff-Appellant (hereinafter referred to as Plaintiff) filed a charge with the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC) alleging that on June 21, 1971, she was unlawfully terminated from her employment due to her race by the Detroit Board of Education.

Earlier the Plaintiff had filed a similar charge alleging continuing discrimination with the Michigan Civil Rights Commission under a Michigan Statute that gave the Civil Rights Commission jurisdiction over public entities as the school board. (See Appendix page 16a the Michigan State Fair Employment Practices Act, 1955 P.A. 251; CL §423.301, *et seq*. at CL §423.302(b); M.S.A. §17.458(1), *et seq*. at M.S.A. §17.458(2) (b) wherein an employer is defined as "a state or any political or civil subdivision thereof.")

At the time of the discharge, June 21, 1971, the Equal Employment Opportunity Act of 1964, 42 U.S.C. 2000e, *et seq*. (hereinafter referred to as title VII) did not allow the agency created by said act to exercise jurisdiction over public entities as the school board.

Effective March 24, 1972, title VII was amended so as to include public entities within the scope of its jurisdiction. In addition, the time for filing a charge with the agency was expanded to 300 days for those who previously had filed charges with an appropriate state agency. (See title VII as amended 42 U.S.C. 2000e-1; 2000e-5(e).

In Michigan, under its Constitution, a person who has been discriminated against does not have to exhaust administrative remedies in order to bring an action against the alleged discriminator. *Pompey v. General Motors Corporation*, 385 Mich. 537 (1971); *Holmes v. Haughton Elevator Co.*, 404 Mich. 36 (1978).

Under the applicable Statute of Limitations, the Plaintiff thus had until June 21, 1974 to exercise her State cause of action. M.C.L. §600.5805; M.S.A. §27A.5805 (See Appendix p. 17a).

On April 21, 1972, being apprised of the new, broader title VII jurisdiction, Plaintiff filed and the EEOC accepted her charge of a racially based discriminatory discharge against the school board.

After April 21, 1972, until it issued its "Right To Sue Letter" on July 13, 1975, the EEOC kept Plaintiff's charge, investigated it, assumed complete jurisdiction over the matter, held itself out to her as the means by which she should and could gain relief from racial discrimination, embarked upon and completed a full investigation of the matter, reached a finding in November, 1974 that, indeed, the school board acted against Plaintiff in a racially discriminatory manner, invited Plaintiff and the school board to Settlement Conferences, mediated and negotiated the matter and in all ways possible acted in this matter as if it had full jurisdiction and caused the Appellant to rely on it.

While EEOC was conducting its investigation, making further inquiries of Plaintiff and of the school board, examining records, interviewing school officials and attempting to elicit cooperation from the school board, at least five events occurred: (1) On April 26, 1972, the school board's attorney informed EEOC that they lacked jurisdiction over the dispute, a fact EEOC failed ever to convey to Plaintiff; (2) The applicable three year statute of limitations on any cause of action, including one under 42 U.S.C. §§1981, 1983, elapsed; (3) EEOC continued to hold itself out to Plaintiff as pursuing her remedy even after the applicable statute of limitations elapsed; (4) EEOC, without the statutory authority to do so, made its determination of employer discrimination; (5) EEOC attempted to enforce its conciliation powers upon the school

board almost a full year after the statute of limitations as to other actions elapsed, thus further holding itself out to Plaintiff for her to justifiably rely upon it as the means to her remedy. All of these EEOC actions were done by Delbert Hunt or his delegees.

Throughout all of these years, the EEOC had no legal power to take action of any kind whatsoever against the school board, since the enabling amendment became effective 10 months after the Plaintiff's discharge by the school board.

Within the requisite statutory 90 day period, Plaintiff commenced her title VII suit in the federal district court.

On November 17, 1975, the Plaintiff's action was dismissed by that court because of the EEOC's lack of jurisdiction and Plaintiff's inability to bring an action under title VII against the school board.

On October 27, 1977, Plaintiff timely notified the parties of her claim under the Federal Tort Claims Act, 28 U.S.C. §2675. In such letter, a full expository statement of Plaintiff's entire claim, the facts surrounding it as known, and a money demand were made.

On November 29, 1977, the EEOC acknowledged Plaintiff's claim and burdened the Plaintiff by requesting her to fill out forms that were applicable only to auto accident or realty or personal property tort claims, but not to the type of tort claim Plaintiff noticed EEOC.

On October 23, 1978, not having received any reasonable requests or answers from EEOC, Plaintiff timely filed the instant action under the Federal Tort Claims Act.

On September 6, 1979, after the filing of motions, briefs of counsel, and oral argument, the district court dismissed Plaintiff's action. (See App. p. 1a).

Thereupon an appeal was timely taken, and the district court was affirmed (App. pp. 2a-4a).

EXISTENCE OF JURISDICTION BELOW

The District Court for the Eastern District of Michigan, Southern Division, had jurisdiction over these federal tort claims under 28 U.S.C. §2674, the Fifth Amendment of the United States Constitution and 28 U.S.C. §§1331, 1391(c).

On August 31, 1971, the district court entertained oral arguments on the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction. On August 31, 1979, the district court entered an Order Dismissing Petitioner's Cause of Action. (App. p. 1a).

Thereafter, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the district court's dismissal of Petitioner's cause of action under the Federal Tort Claims Act. (App. pp. 2a-4a).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The United States Court of Appeals for the Sixth Circuit decided important questions of federal law arising out of this matter not heretofore fully settled by this Court, although the lower courts' decisions on these federal questions are in conflict with applicable decisions of this Court. Certiorari should be granted pursuant to Supreme Court Rule 17.1(c).

Pursuant to 42 U.S.C. §2000e(4) (a), Congress created the Equal Employment Opportunity Commission (hereinafter EEOC). 42 U.S.C. §2000e(5) (a) states:

> (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practices set forth in section 2000e-5 or 2000e-3 of this title.

The EEOC did not have statutory authority under title VII to " . . . prevent [a public entity] from engaging in any

unlawful employment . . . " occuring prior to March 24, 1972 when title VII was amended so as to include within the definition of a "person", governments and governmental agencies.

The purpose of title VII is effectuated through accepting and investigating charges of discrimination made by employees against employers subject to title VII pursuant to 42 U.S.C. §2000e-5(b). The EEOC pursuant to 42 U.S.C. 2000e-4(g) is empowered to assist persons seeking assistance in elimination of employment practices.

The EEOC in furtherance of 42 U.S.C. §2000e-4 has promulgated regulations clearly limiting the scope of its activities and jurisdiction. 29 C.F.R. §1601.6 states as follows:

> Subpart B — Procedure for the Prevention of Unlawful Employment Practices.
>
> §1601.6 Submission of information.
>
> The Commission shall receive information concerning alleged violations of Title VII from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office shall render assistance in the filing of a charge. Any person or organization may request the issuance of a Commissioner charge for an injury into individual or systematic discrimination. Such request, with any pertinent information, should be submitted to the nearest District Office.

The EEOC's acceptance of Petitioner's charge constituted an act of misfeasance inasmuch as the EEOC and its employees breached the statutory mandate the proximate cause of which resulted in damages to Petitioner. The EEOC's violation of title VII was negligence *per se*.

Liability should be imposed on the United States under the Federal Torts Claims Act inasmuch as such liability would be incurred by a private individual under like circumstances. 28 U.S.C. §1346(b), 2671 *et seq*.

The EEOC pursuant to 42 U.S.C. §2000e-5(b) is empowered to serve notice of a charge of discrimination, and make an investigation. Further, the EEOC is empowered by the aforementioned statutory provision to determine if there is reasonable cause to believe the charge is true, to dismiss the charge or use informal methods to eliminate alleged unlawful employment practices, such methods being conferences, conciliation and persuasion. The EEOC may also commence litigation in the courts for appropriate relief.

The EEOC has as its chief a "General Counsel" and "regional attorneys". 42 U.S.C. 2000e-4(b). The EEOC is further empowered to subpoena persons and give technical assistance and make technical studies.

All of these functions are administered and supervised by attorneys. Whether the EEOC chooses to have incompetent persons advising claimants that the EEOC will assist them under title VII despite the obvious negligence *per se* is no different than if a private attorney chooses to employ clerical or paralegal personnel to interview and investigate charges without adequate legal review. The malpractice pervades both arenas, and if not tolerated in the private sector is equally offensive, if not more so, in the public sector.

The EEOC is designed to act as a private attorney acts. It determines if a cause of action exists under its mandate and proceeds to demand and investigate, confer, persuade, conciliate and sue. The function of both are virtually identical.

Where the private attorney accepts a case, fails to file suit and all statutes of limitations run while he asserts professional authority over the file, he is negligent *per se*. This applies with equal force to the within set of circumstances and to the EEOC.

The EEOC's enabling statute creates a duty to investigate discrimination charges OVER WHICH IT HAS JURISDICTION AND PURSUANT TO 42 U.S.C. §2000e *et seq*.

In the legislative history of title VII of the Civil Rights Act of 1964, June 17, 1964, pp. 14186-14192, 42 U.S.C. §2000e-5(b) was debated and in particular Senator Ervin proposed an amendment to delete the language of title VII that authorizes a member of the EEOC to file a charge of unlawful discrimination. The amendment was obviously rejected. During the debate, Senator Ervin argued, that "it is prostitution of the judicial process to combine the role of *prosecutor* with that of judge." (emphasis supplied).

Quoting Justice Jackson, Senator Ervin further stated,

> Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness, it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission in the role of prosecutor presented to itself.

Senator Humphrey in response stated the purpose of the Commission.

> Mr. HUMPHREY. The Commission has some expertise in the matter. It has some knowledge over and above that of the ordinary plain, common laborer, or the ordinary worker. The purpose of the Commission is to try to conciliate and mediate, and bring about voluntary compliance with the standards of the bill. We do not appoint Commissioners as wall decorations. Their job is to do something. However, they do not carry a club. They carry the art of persuasion with them. They are like the Federal Mediation and Conciliation Service. They have no authority of law. The most they have is the standard of being a Government employee seeking to help bring about adjudication and mediation.

All of the statutory functions of the EEOC are based on an underlying premise: The EEOC has determined it has jurisdiction of the charge. This is a legal determination made by its General Counsel, or regional attorney. The "ordinary plain, common laborer, or the ordinary worker" is presumed in the design of the law to have less "knowledge" than the regional attorneys of the EEOC. The circumstances are clearly like that of a private individual where the latter would be liable for negligently asserting authority where none existed.

In this case, if the EEOC and its regional attorneys had properly responded to Petitioner's charge of employment discrimination, it would never have asserted jurisdiction. The respondent in the charge was a governmental unit over which the EEOC by law could not exercise its powers. Nevertheless, three years after the Petitioner filed her charge the EEOC issued a right to sue letter. During the three year period, the EEOC utilized its powers in investigating, conciliating, and persuading the parties. Petitioner was aware that such investigation was taking place. While the charge was pending all applicable statutes of limitations under other theories of law giving rise to different causes of action expire.

The Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.* at §2674 states:

> The United States shall be liable, respecting the provisions of this Title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .

It has long been held that the Act's purpose was to compensate the victims of negligence in the conduct of governmental activities in circumstances like those in which private persons would be liable. *Indian Towing Co. v. United States*, 350 U.S. 61; 76 Sup. Ct. 122, 100 L.Ed. 48 (1955).

Appellant has above showed the Court like circumstances in which private persons would be held liable for similar conduct.

The purpose of the act is to establish governmental liability, waiving the government's traditional total sovereign immunity and abolishing the cumbersome procedure whereby Congressional action was necessary to redress all harms caused by the government's torts. *Rayonier, Inc. v. United States*, 352 U.S. 315; 77 Sup. Ct. 374, 1 L.Ed.2d 354 (1957); *United States v. Le Patourel*, 571 F.2d 403 (8th Cir. 1978).

Even though its application to the EEOC is new, this Appellant, as shown above, has not created a new tort.

When the government harms a person by its acts or omissions, the government is subject to liability according to the tests and standards of substantive state law in the state in which the act or omission occurred. *Richards v. United States*, 369 U.S. 1; 82 Sup. Ct. 585, 76 L.Ed.2d 492 (1978); *Cooner v. United States*, 276 F.2d 220, 244 (4th Cir. 1960) Thus, the Michigan substantive tort law as to an individual's duty of care controls. The government's liability does not depend upon whether the alleged tort occurred in the course of activities which private persons do not perform. *Indian Towing v. United States, supra; Rayonier, Inc. v. United States, supra; Mid-Centrel Fish Co. v. United States*, 112 F.Supp.792; affirmed 210 F.2d 263 (8th Cir. 1954); *cert. den.* 347 U.S. 967; 745 Sup. Ct. 778, 98 L.Ed. 1108.

The act is a broad waiver of the government's immunity from liability for torts of its employees while acting in the scope of their employment. *Fitch v. United States*, 513 F.2d 1013 (6th Cir. 1975).

The Plaintiff's claim arises out of the acts of the government's agents who, without any statutory authority, took jurisdiction over her claim under a wrongful assumption on their

part that they could act. Even though they were notified very early by the school board that they lacked jurisdiction, the EEOC continued to exercise its power and induced Plaintiff to rely upon their acts purporting to be on her behalf and purporting to be her remedy.

Not only did the EEOC continue to act as Plaintiff's agent, it failed to inform her, a lay-person, of even the possibility that the EEOC could not assist her and that she had no title VII remedy.

These acts and omissions by the EEOC were committed in the face of the long held general rule that "a law is presumed, in absence of clear expression to the contrary, to operate prospectively." *Hassett v. Welch*, 303 U.S. 303, 314 (1938).

The EEOC continued to act upon Plaintiff's claim and continued to induce her reliance in their acts even after it became clear that this general rule was applicable to title VII, §2000e(16). *Place v. Weinberger*, 497 F.2d 412 (6th Cir. 1974).

The school board could not be held to task under title VII for its discrimatory act that occurred before the statute applied to governmental units. *Hutchison v. Lake Oswego School District*, 374 F.Supp. 1056 (1974).

It has long been held that each step in the EEOC's administrative process "is designed to be a prerequisite to the following step and ultimately to suit . . . ." *EEOC v. National Cash Register*, 405 F.Supp. 562, 563 (1975).

Thus, the purpose of the procedures followed by EEOC was to (1) determine if an unlawfully discriminatory act occurred; and (2) if such an act occurred, afford the injured party, here the Plaintiff, a remedy, even if through litigation. Litigation is the ultimate step in the process.

It would be indeed jejune for one to conduct an in depth investigation, make a finding of wrongful discrimination and

then attempt the conciliation process if a remedy for the wronged party was not a possible result.

It is no defense to Plaintiff's claims that the government's employees were following the statute, because the statute did not confer any power to EEOC over Plaintiff's claims.

Nor were these employees following regulations. The EEOC has seen its cases dismissed in circumstances wherein its sub-directors had acted when the five person Commission had illegally subdelegated to District Directors nondelegatable powers. *EEOC v. Raymond Metal Producing Co.*, 385 F.Supp. 907 (1974). The situation herein is even more grievous.

When an agency of the United States undertakes a task, it must perform that task with due care. *Sawyer v. United States*, 465 F.Supp. 282. The EEOC utterly failed to exercise due care in this matter and that failure harmed the Plaintiff.

Section 28 U.S.C. §§1346, 2680 creates the "Discretionary Function" exception to the Federal Torts Claims Act.

However, for purpose of the act, the discretionary function must be *within the authority* or competence of the agency or its officials as delegted by statute, regulation or jurisdictional grant. *Socialist Workers Party v. Attorney General of The United States*, 463 F.Supp. 515; *Griffin v. United States*, 500 F.2d 1059 (3rd Cir.)

Here, the procedure followed by the EEOC was not within EEOC's authority, nor has Defendant alleged that these acts were within EEOC's authority. Discretion requires first that there be authority. One cannot abuse discretion which one does not have. In addition, since there was no authority, the Defendants did not act in the "execution of a statute or regulation." In this respect, this case is unlike *Kelly v. EEOC*, 468 F.Supp. 417 (D.C. Md., 1979), where the asserted negligence of EEOC was in EEOC's good faith decision on the

merits of a charge over which it did have jurisdiction. That is discretionary.

It has also been held that 28 U.S.C. §2680(h) precludes recovery upon any claim arising out of either negligent or willful misrepresentation. *United States v. Neustadt*, 366 U.S. 696 (1961).

However, where, as in the instant matter, there were facts that Defendants should have known or ascertained, there was a duty to disclose those facts; and there was another duty to perform, that is, to determine correctly whether it had jurisdiction. Its negligence in its conduct in search of the facts, amounts to a failure to carry out the duty to perform and does not come within the meaning of the "Misrepresentation Exclusion." That exclusion did not preclude a malpractice action based on an allegation that the government had a duty not only to communicate a correct diagnosis to the injured party, but also to render proper care for the treatment of the physical condition from which the injured party suffered, and that there was a failure to perform the later duty as a result of the negligent manner in which the fact gathering was or should have been made. *Hangerford v. United States*, 307 F.2d 99 (9th Cir.)

The exclusion does not apply in instances like the present matter where the gravamen of the complaint is not a misrepresentation but the negligent performance or nonperformance of duties. *Betesh v. United States*, 400 F.Supp. 23.

In fact in the instant case, a part of the government's negligence was its failure to make representations to Plaintiff. The government through its conduct caused the Plaintiff to rely on it. However, it acted in a totally negligent manner in its procedure, its delay, its acts and its omissions.

In the final analysis, the government's acts and omissions caused Plaintiff to lose her discrimination action an action

that was available to her by and through a parallel state statutory scheme or through another federal statute.

Stewart v. EEOC, 431 F.Supp. 47 (1976), the Plaintiff brought an action for declaratory and injunctive relief based on alleged violations of title VII, the Administrative Procedure Act and the Fifth Amendment to the United States Constitution.

There, citing *Larson v. Domestic and Foreign Commission Corp.*, 337 U.S. 682 (1949) the court held that an action alleging that federal officials acted beyond or in conflict with their statutory powers could be maintained.

Further the court, citing *Chriscraft Corp. v. United States Equal Opportunity Commission*, 465 F.2d 745 (5th Cir. 1972) held that the Administrative Procedure Act's judicial review provision should be used when a party has made a showing that (1) agency action has been unreasonably delayed, and (2) agency delay has been prejudicial.

Here the invocation of the APA's remedies never could have afforded Plaintiff a remedy. However, the officials acted beyond their authority and the Administrative activity took an unreasonably long time — over three years — and the delay caused by the agency was the proximate cause of the Plaintiff not exercising alternative modes of relief and, in the final analysis, losing that relief.

The Plaintiff's loss occurred only because of the EEOC's negligence.

The lower court erred in its finding that the agency owed Plaintiff no duty. The agency owes her and every person the duty of acting within the scope of its granted authority, of knowing the boundries of its authority, and of informing those people who justifiably rely upon it of its availability to assist them so that other rights of these injured persons are not prejudiced. These duties gain even greater import where, as

here, by the EEOC's own findings, the Plaintiff was the victim of race discrimination and the omissions of the agency deprived here of the information she needed to pursue her actual remedy, thus defeating her claim.

In her Complaint, Paragraph 11, the Plaintiff alleges that the Defendant violated her property right to relief in violation of the mandate of the United States Constitution and 42 U.S.C. §§1981, 1983.

It is now well established that a tort arises from the violation of one's Constitutional right. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388; 91 Sup. Ct. 1999, 29 L.Ed.2d 619 (1971); *Butz v. Economou*, 438 U.S. 478; 98 Sup. Ct. 2894, 57 L.Ed.2d 895 (1978).

It has been held that an injured party may proceed under the Federal Torts Claim Act while relying upon the Constitutional Tort theory. *Founding Church of Scientology, Inc. v. Director, Federal Bureau of Investigation*, 459 F.Supp. 748 (1978).

Therefore, the Plaintiff has a valid claim under the act under more than one tort theory.

It should be noted that the lower courts in this matter considered one issue, and one issue only: Did a cause of action exist against the EEOC under the Federal Tort Claims Act.

In *Pima County Community College Dist v. EEOC, et al.* (D.C. Ariz., 1976) 11 EPD §10,867, the EEOC was sued by an employer under the Administrative Procedure Act seeking in part a Writ of Mandamus. Defendants' argued that " . . . even if this Court has jurisdiction to entertain Plaintiffs' complaint, the United States is protected by sovereign immunity." *supra*, p. 7663. In rejecting the government's contention, the federal district court stated as follows, *supra*, 7663:

The mandamus statute as well as the Administrative Procedure Act do not constitute a consent on the part of the United States to be sued, and therefore, there is no waiver of sovereign immunity. See *Washington v. Udall*, 417 F.2d 1310, 1320 n.15 (9th Cir. 1969). It appears that no specific statute waives the United States' immunity from suit in this action. The doctrine of sovereign immunity does not apply, however, either when the defendant has acted in his individual capacity or outside the scope of his authority. See *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999 10 L.Ed. 2d 15 (1963). Therefore, if an officer is acting without authority, or contrary to a clear duty, or in clear abuse of discretion, the doctrine of sovereign immunity will not apply. This is the 'ultra vires' exception to the doctrine of sovereign immunity. See *Washington v. Udall*, 417 F.2d 1310, 1317 (9th Cir. 1969). Only 'when the relief sought would work an intolerable burden on governmental functions, outweighing any considerations or private harm, /would the action/ fail notwithstanding allegations falling within the recognized exceptions to sovereign immunity'. *Association of Northwest Steelheaders v. United States Army Corps of Engineers*, 485 F.2d 67, 69 (9th Cir. 1973). The Court perceives no such intolerable burden from the relief here sought by the plaintiffs.

CONCLUSION

This Court should review this case because the Petitioner has raised an important question of federal law although, in part, decided by this Court in prior decisions, it has not been fully settled by this Court. A governmental agency as the EEOC designed and operating around professional legal counsel including general counsel and regional attorneys has a duty to act within the parameters of its enabling statute. Breaching this duty constitutes negligence *per se*. The Petitioner was a person for whom title VII was clearly designed to assist. The professional duty of a governmental agency must be clearly delineated by this Court. This is a matter of substantial public importance and concern. For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARVIN D. SHARON, P.C.

by: Marvin D. Sharon (P 23380)
Attorney for Petitioner
1450 City National Bank Building
Detroit, Michigan 48225
Telephone: (313) 965-1070

Dated: September 18, 1981

APPENDIX

ORDER OF THE U.S. DISTRICT COURT

(Dated September 6, 1979)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LOUVERT WELDON,
Plaintiff,

-vs-

CIVIL NO. 8-72713
HONORABLE
JAMES P. CHURCHILL

DELBERT HUNT AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Defendants.

_____ /

ORDER

At a session of said court held in the Federal Building and U.S. Courthouse on August 31, 1979.

PRESENT: HON. JAMES P. CHURCHILL

This matter having come before the court on defendants' Motion To Dismiss, the parties having had an opportunity to be heard, and the Court having stated its reasons on the record,

IT IS HEREBY ORDERED that this matter is dismissed.

JAMES P. CHURCHILL
United States District Judge

DATED: SEP 6, 1979

OPINION OF THE COURT OF APPEALS

(Filed June 22, 1981)

No. 79-1624
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOUVERT WELDON,
Plaintiff-Appellant

v. ORDER

DELBERT HUNT, DISTRICT DIRECTOR and
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,
Defendants-Appellees

Before: KEITH, MARTIN, and JONES, Circuit Judges.

Weldon appeals the dismissal of her negligence action against Delbert Hunt, an employee of the EEOC, and the EEOC under the Federal Tort Claims Act, 28 U.S.C. § 2675. Weldon is a black woman who once worked for the Detroit Board of Education. She was terminated on June 21, 1971. On April 24, 1972, Weldon filed a complaint with the EEOC, alleging she had been discharged because of her race. Earlier, Weldon had filed a similar charge with the Michigan Civil Rights Commission. After preliminary investigation of the matter, which took three years to complete, the Department of Justice issued a "right to sue" letter on June 13, 1975.

On September 10, 1975, Weldon sued the Board of Education and the Detroit Federation of Teachers directly under Title VII, 42 U.S.C. § 1981. This action was dismissed because neither defendant was a "person" under the statutory

definition at the time of her discharge. Furthermore, the 1972 amendments which broadened the definition of "persons" were not thought to be retroactive.

Weldon then brought this action against Delbert Hunt under the Federal Tort Claims Act and the Fifth Amendment, alleging that defendants were negligent in accepting and processing a discrimination charge over which the EEOC had no jurisdiction. She claims that she was harmed by her reliance on defendants' administrative procedures because the statute of limitations ran on other causes of action she had under federal and state law. Plaintiff alleged that "but for" the negligence of Delbert Hunt and the EEOC, her discrimination charge would have been rejected by the EEOC for lack of jurisdiction, and she would have been put on notice that she should proceed against the Board of Education under other statutes before the statute of limitations ran.

The District Court ruled from the bench, dismissing Weldon's claim for the following reasons:

> The Court: In the final analysis there was no duty here that was violated. In order to be negligent there has to be a violation of a duty. I think it is absolutely almost facetious to say the EEOC has a duty to tell somebody they got a right to bring another lawsuit. They had the right under law. The EEOC has certain duties to perform and the failure to advise her of all her rights under the other statute and Constitution of the United States isn't one of them.
>
> There is a failure to state a claim. The action is dismissed.

On appeal, Weldon contends that the District Court erred in finding that the EEOC did not owe her a duty to tell her she had a right to bring an independent action against the Board

of Education and the Teachers' Union. In essence, Weldon contends that, in addition to its statutory duty to investigate employment discrimination, the EEOC assumed the duty to act as her agent and her "attorney" in prosecuting her charge. According to Weldon's theory, the EEOC breached its fiduciary duty in failing to disclose that it might not and did not have jurisdiction over her claim. She contends that the EEOC should have predicted and warned her that the 1972 amendments to Title VII would not apply retroactively to Weldon's charge against the Board of Education.

The EEOC contends that Weldon's claim is barred by the two-year statute of limitations for actions brought under the FTCA, 28 U.S.C. § 2401(b). It also argues that it owed no duty to Weldon to warn her of the possible lack of jurisdiction, since the EEOC's enabling statute merely creates a duty to investigate discrimination charges, not to counsel charging parties about alternative legal remedies. The EEOC maintains it was not negligent in assuming jurisdiction because it acted reasonably in relying on Fifth Circuit authority for the retroactivity of the 1972 amendments, in that *Place v. Weinberger*, 497 F.2d 412 (6th Cir. 1974), *cert. denied*, 419 U.S. 1040, *vacated*, 426 U.S. 932 (1976), was not decided by the Sixth Circuit until one month before her other causes of action were barred.

Finally, the EEOC contends that it could not reasonably have foreseen that Weldon would rely exclusively on their procedures without pursuing other avenues of relief.

We affirm the judgment of the District Court. To hold otherwise would in our view impose a duty on the EEOC for which there is no statutory or other justification.

ENTERED BY ORDER OF THE COURT

Clerk

ISSUED AS MANDATE: JULY 14, 1981
COSTS: NONE

UNITED STATES CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE

28 USCS § 1254 (1)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 USSC § 1331 (a)

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and

arises under the Constitution, laws, or treaties of the United States.

28 USCS § 1346 (b)

§ 1346. United States as defendant

* * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USCS § 1391 (c)

§ 1391. Venue generally

* * *

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

28 USCS § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like cir-

cumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

28 USCS § 2675

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages. June 25, 1948, c. 646, 62 Stat. 983; May 24, 1919, c. 139, § 126, 63 Stat. 107.

28 USCS § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346 (b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repeated. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

42 USCS § 1981

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

42 USCS § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, sub-

jects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

42 USCS § 2000e-1

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Pub.L. 88-352, Title VII, § 702, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 3, Mar. 24, 1972, 86 Stat. 103.

42 USCS § 2000e-4 (a), (b) and (g)

§ 2000e-4. Equal Employment Opportunity Commission — Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which

shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their succesors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of Title 5, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and General Schedule pay rates: *Provided,* That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of Title 5.

General Counsel: appointment; term; duties; representation by attorneys and Attorney General

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General

Counsel shall have responsibility for the conduct of litigation as provided in sections 2000c-5 and 2000c-6 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

* * *

Powers of Commission

(g) The Commission shall have power —

(1) to cooperate with and, with their consent, utilize regional, State, local and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

42 USCS § 2000e-5(a), (b) and (e)

§ 2000e. Enforcement provisions — Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year,

or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of this charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

CODE OF FEDERAL REGULATIONS

29 CFR §1601.6

Subpart B — Procedure for the Prevention of Unlawful Employment Practices

§ 1601.6 Submission of information.

The Commission shall receive information concerning alleged violations of Title VII from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office shall render assistance in the filing of a charge. Any person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systematic discrimination. Such request, with any pertinent information, should be submitted to the nearest District Office.

MICHIGAN STATUTES ANNOTATED

Miscellaneous Labor Regulations

MICHIGAN STATE FAIR EMPLOYMENT PRACTICES ACT
Act 251, 1955, p 411; eff October 14.
(Title as amended by Pub Acts 1972,
No. 267, imd eff October 5.)

* * *

§ 17.458(1) Opportunity to obtain employment without discrimination declared civil right. SEC. 1. The opportunity to obtain employment without discrimination because of race, color, religion, national origin, [sex, age] or ancestry is hereby recognized as and declared to be a civil right. (MCL §423.301.)

Title 27A — Judicature; Procedure

§ 27A.5805 Limits on actions to recover damages for injuries to persons or property. SEC. 5805. No person may bring or maintain any action to recover damages for injuries to persons or property unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

(1) the period of limitations is 2 years for actions charging assault, battery, and false imprisonment.

(2) The period of limitations is 2 years for actions charging malicious prosecution.

(3) The period of limitations if 2 years for actions charging malpractice.

(4) The period of limitations is 2 years for actions against sheriffs charging misconduct or neglect of office by themselves or their deputies.

(5) The period of limitations is 2 years after the expiration of the year for which a constable was elected for actions based on his negligence or misconduct as constable.

(6) The period of limitations is 1 year for actions charging libel or slander.

(7) The period of limitations is 3 years for all other actions to recover damages for injuries to persons and property.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-607

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOUVERT WELDON, PETITIONER

v.

DELBERT HUNT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-607

LOUVERT WELDON, PETITIONER

v.

DELBERT HUNT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the Equal Employment Opportunity Commission (EEOC) should be held liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, for failure to inform her that it lacked jurisdiction over her Title VII discrimination claim before the statute of limitations ran on other claims she may have had.

1. In April 1972, petitioner filed a charge with the EEOC claiming that the Detroit Board of Education had terminated her employment in June 1971 because of her race, in violation of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (C.A. App. 48).[1] The EEOC investigated petitioner's complaint and attempted to conciliate the dispute with her former employer (*id.* at 47). When this effort finally failed in

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[1] "C.A. App." refers to the joint appendix filed in the court of appeals.

1975, the Department of Justice issued a "right to sue" letter (*id.* at 34-34a).

Petitioner then filed suit in the United States District Court for the Eastern District of Michigan against the Detroit Board of Education and the Detroit Federation of Teachers (C.A. App. 50). Her complaint alleged violations of Title VII, 42 U.S.C. 1981, and the Fourteenth Amendment. The district court dismissed the Title VII count because at the time petitioner was discharged in 1971 the defendants were not "persons" within the meaning of Title VII and because the 1972 amendments to the Act (42 U.S.C. 2000e(a)), which broadened the definition of "person" to include governmental agencies, did not apply retroactively (C.A. App. 36, 38-39). The court dismissed the remaining claims on the basis that they were barred by the applicable three-year statute of limitations (*id.* at 40). Petitioner did not appeal that judgment.

2. Petitioner then brought this action under the Federal Tort Claims Act against the EEOC and Delbert Hunt, the agency's District Director.[2] She alleged that the EEOC was negligent in accepting and processing her discrimination charge against a governmental agency over which it had no jurisdiction and that, as a proximate result of this negligence, the statute of limitations had run on other causes of action she could have pursued (C.A. App. 2-4).

The district court dismissed the complaint for failure to state a claim (C.A. App. 9). At an oral hearing on the motion, the court stated: "The EEOC has certain duties to perform and the failure to advise [petitioner] of all of her

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[2]Although petitioner's complaint was filed against the EEOC, the United States is the only proper defendant under the Tort Claims Act. 28 U.S.C. 2674, 2679(a). Moreover, although the complaint named Delbert Hunt as an additional defendant, it did not include any specific allegations against Hunt (see C.A. App. 2-3).

rights under the other statute and Constitution of the United States isn't one of them" (*id.* at 25; Pet. App. 3a). The court of appeals affirmed, declining to "impose a duty on the EEOC for which there is no statutory or other justification" (Pet. App. 4a).

3. Petitioner's basic contention (Pet. 6) is that the EEOC had a duty, acting essentially as her attorney, to inform her that it lacked jurisdiction over her charge and to encourage her to pursue other available legal remedies. There is, however, no basis for petitioner's assertion that the Commission and its employees should have acted as her attorneys.

Certainly Title VII does not envision the Commission's serving as private counsel for each individual who files a charge with it. Instead, the statutory obligation of the EEOC is "to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). In fulfilling these duties, the Commission does not assume the role of legal counsel pursuing all avenues of relief available to a client. Instead, the individual is allowed, and at times even expected, "to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (quoting *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 48).[3]

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[3]The only arguable error that the EEOC committed was in failing to inform petitioner that the 1972 amendments to Title VII were not retroactive to employment discrimination practices by governmental agencies occurring prior to the March 1972 effective date of the amendments. At the time petitioner's complaint was filed and processed, however, the courts had not yet determined the issue; indeed, it has remained a source of controversy. Compare *Place* v. *Weinberger*, 497 F. 2d 412 (6th Cir.), cert. denied, 419 U.S. 1040 (1974), vacated, 426

Petitioner's claim is not advanced by her reliance (Pet. 8-9) on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), and *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957). Both of those cases involved situations where a governmental agency undertook voluntarily to perform a task, which created a corresponding duty to perform it non-negligently. Here, the EEOC never purported to do any more than its statutory duty under Title VII, *i.e.*, investigate the charges of discrimination and attempt to conciliate the dispute. Petitioner makes no claim that these efforts were performed poorly. The additional responsibility for pursuing remedies under other applicable state and federal statutes remained with petitioner throughout the time her charge was pending before the Commission. See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48-49; *Johnson* v. *Railway Express Agency, Inc.*, *supra*. The court of appeals properly refused to allow her to impose that duty on the EEOC and its employees.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

U.S. 932 (1976), with *Huntley* v. *Department of Health, Education and Welfare*, 550 F. 2d 290 (5th Cir. 1977); *Laurel* v. *United States*, 547 F. 2d 917 (5th Cir. 1977). See also *Brown* v. *GSA*, 425 U.S. 820, 824 n.4 (1976). Thus, the Commission acted reasonably at the time in attempting to assist petitioner by accepting the case and initiating efforts at conciliation on her behalf.

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